2012

Peak Alarm Company v. Salt Lake City Corp : Brief of Appellant

Utah Court of Appeals

IN THE SUPREME COURT OF UTAH

PEAK ALARM COMPANY, INC., a Utah corporation, JERRY D. HOWE, an individual, and MICHAEL JEFFREY HOWE, an individual Plaintiffs and Appellees, v. SALT LAKE CITY CORP., a Utah municipal corporation; SHANNA WERNER, an individual; CHARLES F. "RICK" DINSE, an individual; SCOTT ATKINSON, an individual; and JAMES BRYANT, an individual, Defendants and Appellants.	**BRIEF OF APPELLANTS** Case No. 20120050

On Appeal From the Third Judicial District Court,
In and For Salt Lake County, State of Utah, Case No. 050906433

HONORABLE L. A. DEVER

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JURISDICTION

This Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j) (2009).

STATEMENT OF ISSUES

1. Did the trial court err in concluding that Plaintiffs' state law defamation and false arrest claims are not barred by Utah's one-year statute of limitations, Utah Code Ann. § 78-12-29(4)? This issue was preserved in the trial court in the Defendants' memoranda on summary judgment at R. 2971-73, 3123-24, 3187-88, and 3227-29.

Standard of review: The Utah Supreme Court reviews a district court's conclusions of law and ultimate grant or denial of summary judgment for correctness, and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Bingham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 10, 235 P.3d 730.

STATEMENT OF THE CASE

This case arose from the issuance of a citation to Plaintiff Jeff Howe by Salt Lake City Police Sgt. James Bryant on July 21, 2003, and Mr. Howe's subsequent acquittal on directed verdict. Mr. Howe, his father Jerry, and their company, Peak Alarm (collectively referred to herein as "Plaintiffs") filed a notice of claim on June 25, 2004. Plaintiffs brought suit against Sgt. Bryant and Shanna Werner (Salt Lake City's Alarm Coordinator) on April 7, 2005 in their individual capacities, alleging (among several other causes of action) Utah law claims of false arrest/imprisonment against Sgt. Bryant,

and defamation against Ms. Werner[1]. Bryant and Werner moved for summary judgment, which was denied by the trial court as to these two claims. *R. 3236-38.* The trial court's decision was certified as a final order for purposes of appeal (*R. 3264-66*), and Defendants appealed. *R. 3267-87.* This Court, in an Order dated February 29, 2012, determined that the certification of the trial court's ruling as final was in error, but elected to consider the appeal as a petition for permission to appeal an interlocutory order, and granted the petition. *R. 3387.*

STATEMENT OF FACTS

1. On July 21, 2003, Defendant/Appellant Salt Lake City Police Sgt. James Bryant and a fellow officer met with Jeff Howe at Peak Alarm's place of business to issue him a citation for violating Utah Code Ann. § 76-9-105. *R. 1723, 1745, 1768, 3237.*

2. Jeff Howe admits that Sgt. Bryant gave him the option of being arrested or signing the citation, and that he opted to sign the citation in lieu of arrest. *R. 1770.*

3. Jeff Howe admits he was not handcuffed at any time, he was not physically restrained by Sgt. Bryant, nor did Sgt. Bryant lay hands on him in any way. *R. 1771, 1826.*

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[1] Most of the original causes of action pled in this matter have been dismissed on summary judgment and appeal. However, because the only claims relevant to this appeal are the state law false arrest and defamation causes of action, the other claims, and the proceedings related to those claims, are not addressed herein for the sake of simplicity.

4. The officers then left the building, and Howe was subjected to no further restrictions on his liberty other than to appear in court at some time in the future. *R. 1820-22.*

5. Jeff Howe was tried in Justice Court on April 12, 2004, and won a directed verdict in his favor. *R. 1838-43.*

6. On June 25, 2004, Plaintiffs filed a Notice of Claim with the City Recorder's Office, alleging unlawful conduct by the City and one or more of its employees. *R. 1845-52.*

7. On April 7, 2005, plaintiffs filed their Complaint against the City and the individual defendants in their individual and official capacities. *R. 1-21.*

8. Plaintiffs alleged that Ms. Werner made broad and damaging statements regarding the alarm industry that were published as late as April 30, 2003. *R. 112-15.*

9. Plaintiffs alleged that Ms. Werner also targeted Peak Alarm specifically in a letter to a Peak Alarm customer dated March 21, 2002 wherein she encouraged the customer to "consider selecting another company who will do a better job for you." *R. 115.*

10. Plaintiffs allege that these statements unfairly maligned Peak Alarm, Jerry and Jeff Howe, threatened existing and future business prospects of Peak Alarm, and sent a "chill over the expression of legitimate viewpoints." *R. 115.*

11. Jeff Howe concedes that he knew about all of these allegedly defamatory statements in 2003. *R. 1775-1817, 1802, 1805, 1812-13, 1818-19.*

12. Both parties to this action moved for summary judgment. On August 5, 2008, the trial court heard oral arguments on the parties' summary judgment motions, and took the matter under advisement. *R. 2661.*

13. On October 6, 2008, the trial court issued a Ruling granting summary judgment in favor of the defendants, and denying Plaintiffs' motion for partial summary judgment. *R. 2661-96.*

14. Plaintiffs appealed the Ruling to this Court, which affirmed in part, and reversed in part. The Court remanded seven Utah law claims and one federal law claim back to the trial court. *R. 2753-88.*

15. Defendants again moved for summary judgment on February 4, 2011. *R. 2877-79, 2882-2928, 2953-96.*

16. The trial court ultimately denied summary judgment as to the state law false arrest/seizure and defamation claims on December 7, 2011. *R. 3235-47.*

SUMMARY OF ARGUMENT

Utah Code Ann. § 78-12-29(4) provides that an action for defamation and false arrest must be brought within one year. Jeff Howe alleges he was falsely arrested on July 21, 2003. Therefore, he must have filed his Complaint by July 21, 2004. Because he did not file his Complaint until April 7, 2005, almost nine months too late, his false arrest claim must be dismissed.

Mr. Howe also alleges that he was defamed by comments made by Shanna Werner that were published as late as April 30, 2003. All of the allegedly defamatory comments were either known by Plaintiffs, or were reasonably discoverable, by July of 2003.

Therefore, at the latest, Plaintiffs' Complaint must have been filed by July of 2004 to be timely. Again, because the Complaint was not filed until April of 2005, Plaintiffs' defamation cause of action must also be dismissed as untimely.

Plaintiffs allege that because they complied with the procedural requirements of the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1 *et seq.*, ("the Immunity Act"), they were not required to also comply with the one-year statute of limitation for defamation and false arrest claims. Apparently, the trial court agreed, although it is not entirely clear from the trial court's Ruling whether it actually considered the Complaint's timeliness pursuant to Utah Code Ann. § 78-12-29(4).

In practical terms, the trial court's Ruling effectively rendered Utah's one-year statute of limitation for these claims meaningless and without effect. The trial court should have interpreted both the Immunity Act and the statute of limitation in manner which gave both statutes full effect, absent an express intent to the contrary by the Utah Legislature. It is clear that the Legislature intended to limit a party's ability to bring suit for defamation and false arrest claims to one year. Nothing in the Immunity Act provides that its procedural requirements supplant or supersede any limitation period in other sections of the Utah Code. If that was what the Legislature intended, they certainly knew how to do so.

The Immunity Act provides that where immunity from suit is waived, consent to be sued is granted, and liability of an entity, or its employee, shall be determined as if the entity (or employee) is a private person. It also provides that none of its provisions may adversely affect any immunity from suit that an entity or employee may otherwise assert

under state or federal law. Here, Sgt. Bryant and Ms. Werner were immune from suit by virtue of Utah's one-year statute of limitation, which barred Plaintiffs' untimely Complaint.

The Immunity Act only extends to the grant or waiver of governmental immunity. It does not, in and of itself, provide a basis for liability or any cause of action. Its notice of claim requirements are nothing more than a jurisdictional prerequisite to suit, merely providing a deadline for giving notice of a claim against a governmental entity. It does not prohibit the Legislature from imposing a shorter statutory filing date for any specific cause of action, as it clearly did here.

At least two Utah Court of Appeals cases have required that a plaintiff comply with both the procedural requirements of the Immunity Act, as well as any other statute of limitation that may apply. The most directly on point is *Cline v. State*, 2005 UT App 498, 142 P.3d 127 (cert. denied April 21, 2006), which held that Mr. Cline's libel and slander claims were barred by the same limitation statute at issue here, even though he otherwise complied with the requirements of the Immunity Act.

In *Carter v. Milford Valley Memorial Hospital*, 2000 UT App 21, 996 P.2d 1076, the Court held that Mr. Carter's compliance with the Immunity Act did not excuse him from also complying with the limitation period provided in the Utah Malpractice Act.

Thus, Plaintiffs here were required to comply with both the procedural requirements of the Immunity Act (which they did) AND the one-year statute of limitation for defamation and false arrest claims (which they did not). Nothing prevented them from doing so.

Therefore, the trial court's Ruling denying summary judgment to Sgt. Bryant and Ms. Werner must be REVERSED, and Plaintiffs' defamation and false arrest claims must be dismissed.

ARGUMENT

I.

PLAINTIFFS' STATE LAW FALSE ARREST AND DEFAMATION CLAIMS ARE BARRED BY UTAH'S ONE-YEAR STATUTE OF LIMITATION

Plaintiffs' state law false arrest and defamation claims are barred by Utah's one year statute of limitation, Utah Code Ann. § 78-12-29(4) (2001)[2], which provides: "[a]n action may be brought within one year . . . for libel, slander, assault, battery, false imprisonment, or seduction." There is no dispute that Jeff Howe alleges he was "arrested" and/or "seized" on July 21, 2003. See *Statement of Fact No. 1.* In Utah, a claim for false arrest/seizure arises on the date of the claimed "arrest" or "seizure." *Tolman v. K-Mart Enterprises of Utah, Inc.*, 560 P.2d 1127, 1128 (Utah 1977). Therefore, Plaintiffs must have filed their action for false arrest/seizure by July 21, 2004.

Because the Complaint in this matter was not filed until April 7, 2005, nearly nine months too late, Plaintiffs failed to comply with the one year statute of limitations, and their false arrest claim must be dismissed.

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[2] In 2003, when Plaintiffs' cause of action arose, this code provision was numbered as § 78-12-29(4). In 2008, the Utah Legislature renumbered this statute as § 78B-2-302(4), and removed "assault" and "battery" from subsection four. Otherwise, the relevant language of the two statutes is identical.

Similarly, all of the statements by Ms. Werner that have been alleged to be defamatory were either known by Plaintiffs, or reasonably discoverable, by July of 2003. Therefore, at the latest, Plaintiffs' Complaint alleging defamation must have been filed by July of 2004 to be timely. Because the Complaint in this matter was not filed until April 7, 2005, Plaintiffs' defamation claim must also be dismissed.

II.

THE JURISDICTIONAL PREREQUISITES OF THE IMMUNITY ACT DO NOT SUPERSEDE LIMITATION PERIODS PROVIDED IN OTHER CODE SECTIONS, NOR DO THEY ALTER A PERSON'S OBLIGATION TO COMPLY WITH THOSE LIMITATION PERIODS.

On summary judgment below, Plaintiffs argued that because they timely filed a notice of claim, as required by the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-11[3] ("Immunity Act"), and filed their Complaint within one year of the denial of their notice of claim, they were not required to comply with Utah's one-year statute of limitation. *R. 3021-23, 3036-37.* The trial court apparently agreed, ruling that Utah Code Ann. § 63-30-11(1), when read in conjunction with § 63-30-15(2), "is an indication that such claims may be tolled for the duration of the approval/denial period." *R. 3236-37.* Therefore, "[b]ecause Plaintiffs' Complaint was filed within one year [of the filing of their notice of claim], regardless of a denial or approval, the noted claims are timely

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[3] In 2004, the Utah Legislature repealed the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1 et seq. (1997) and re-enacted it as the Governmental Immunity Act of Utah. Utah Code Ann. § 63-30d-101 et seq. The citations in this brief are to the former statute, which was in effect at the time Plaintiffs' causes of action arose in July of 2003. The Governmental Immunity Act of Utah is currently codified as Utah Code Ann. § 63G-7-101 et seq.

pursuant to the [Immunity] Act." *R. 3238.* However, in its Ruling, the trial court did not specifically address Utah's one-year statute of limitation, nor how that limitation period interfaces with the Immunity Act, so it is not entirely clear whether the trial even considered the Complaint's timeliness pursuant to the one-year limitation period provided in Utah Code Ann. § 78-12-29(4).

Whether it intended to do so or not, the practical effect of the trial court's Ruling is to render the one-year statute of limitation in Utah Code Ann. § 78-12-29(4) meaningless and without effect. It is axiomatic that statutes should not be read in a manner that renders another code section meaningless unless the Legislature clearly expresses otherwise. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible"); *McCoy v. Severson*, 118 Utah 502, 508, 222 P.2d 1058, 1061 (1950) (It is a rule of statutory construction that where there are two or more statutes dealing with the same subject matter they will be construed so as to maintain the integrity of both).

The primary purpose of statutory interpretation is to determine the "true intent and purpose of the Legislature." *State ex rel. Div. of Forestry, Fire & State Lands v. Tooele County*, 2002 UT 8, ¶ 10, 44 P.3d 680 (internal quotation marks omitted). There can be no question that the Utah Legislature intended to limit defamation and false imprisonment claims to one year. An important purpose of a statute of limitation is to

"prevent the injustice which may result from the prosecution of stale claims" due to the "difficulties caused by lost evidence, faded memories and disappearing witnesses." *Lund v. Hall*, 938 P.2d 285, 291 (Utah 1997). The interpretation urged by Plaintiffs would completely ignore the Legislature's clear intent and negate the very purpose of Utah's one-year statute of limitation on these claims.

Further, the Immunity Act contains no provision stating that it takes precedence over, or supersedes, any other limitation contained in the Utah Code. If that was the Utah Legislature's intent, they certainly knew how to do so. To the contrary, the Immunity Act specifically provides that where the government's immunity is waived, consent to be sued is granted, and "liability of the entity shall be determined as if the entity were a private person." There can be no dispute that private persons are subject to the one-year statute of limitation for libel and slander. Additionally, the Immunity Act provides that "[n]othing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law." *Utah Code Ann. § 63-30-4(2).*

Nevertheless, it appears that both Plaintiffs and the trial court misapprehend the Immunity Act, the Utah decisions applying it, and how it interfaces with other statutory limitation periods. The scope of the Immunity Act itself "extends only to the grant and waiver of governmental immunity; the Act does not itself serve as the basis for liability or any cause of action." *Hall v. Utah State Dept. of Corrections*, 2001 UT 34, ¶ 16, 24 P.3d 958 (citing Utah Code Ann. § 63-30-4(1)(c)). Similarly, the notice of claim requirements of the Immunity Act are nothing more than a jurisdictional prerequisite to

suing a governmental entity or employee. *Wheeler v. McPherson*, 2002 UT 16, ¶¶ 9-10, 40 P.3d 632. The Immunity Act merely provides a deadline for which notice must be given that there is a claim against a governmental entity. It does not prohibit the legislature from imposing a shorter statutory filing date for a specific cause of action. The Immunity Act's requirements are not, in and of themselves, a separate and distinct limitation scheme.

Claims that fail to comply with a statute of limitation, even if they otherwise comply with the Immunity Act's jurisdictional prerequisites, are still barred. *Carter v. Milford Valley Memorial Hospital*, 2000 UT App 21, 996 P.2d 1076 (in cases where both the Immunity Act and the Utah Healthcare Malpractice Act apply, compliance with the procedural requirements of both is required); *Cline v. State*, 2005 UT App 498, 142 P.3d 127 (cert. denied April 21, 2006) (libel and slander claims barred by the one-year statute of limitations contained in Utah Code Ann. § 78-12-29(4), even though plaintiff otherwise complied with the Immunity Act). The mere fact that the government has granted statutory rights of action against itself, and imposed certain conditions on those rights of action, does not mean that those conditions supplant and supersede all other statutory provisions related to a claim against a governmental entity. The Immunity Act does not provide a "separate filing scheme and deadlines" to the exclusion of all other statutory provisions, as urged by Plaintiffs.

The *Cline* case is directly on point. There, Cline's cause of action arose no later than November 2002. His notice of claim was filed in April 2003 (five months later), and the Complaint was filed June 10, 2004 (one year and seven months after the cause of

action accrued, and one year and roughly 60 days after the notice of claim was filed)[4]. In spite of the fact that his notice of claim and Complaint were timely filed, and he otherwise complied with the filing requirements of the Immunity Act, the Court of Appeals nevertheless held that his claims were time-barred because Cline failed to comply with the applicable one-year statute of limitation for libel and slander. *Cline*, 2005 UT App 498, ¶ 41 (cert. denied April 21, 2006, 133 P.3d 437).

Similarly in *Carter*, the plaintiff brought a medical malpractice suit against a governmentally-owned hospital. While Mr. Carter complied with the "procedural requirements" of the Immunity Act, he did not comply with the requirements of the Malpractice Act. *Carter*, 2000 UT App at ¶ 15. The Court concluded that compliance with the Immunity Act did not excuse Mr. Carter from also complying with the time limitation in the Malpractice Act. *Id.* Both *Cline* and *Carter* are directly applicable to the issues in this appeal. See also *Thorpe v. Washington City*, 2010 UT App 297, 243 P.3d 500 (applying the Utah Whistleblower Act's ("WBA") 180-day limitation period to action against City where plaintiff otherwise complied with Immunity Act requirements,

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[4] While Plaintiffs correctly pointed out on summary judgment (*R. 3213*) that the decision does not specifically state whether Cline's notice of claim was actually denied, or was deemed denied 90 days after it was filed, it makes no difference whatsoever in the analysis. If Cline had filed his complaint more than one year from the date his notice of claim was denied, the Court would have had an easy decision, dismissing for failure to comply with the Immunity Act's requirements. Instead, the Court analyzed Cline's malicious prosecution, fraud, libel and slander claims under the separate one-year limitation statute, something it would not have done if Cline's complaint was time-barred under the Immunity Act alone.

recognizing that plaintiffs must file a notice of claim related to a WBA cause of action much sooner than the one year provided for in the Immunity Act).

Here, under Utah law, Plaintiffs must have complied with the filing requirements of the Immunity Act (which they did) AND complied with the one- year statute of limitations for defamation and false arrest claims (which they did not). Nothing prevented them from doing so. However, because they failed to file their complaint within one year of the accrual of their causes of action, those claims are time-barred pursuant to Utah Code Ann. § 78-12-29(4). The trial court's Ruling on this issue must be reversed, and Plaintiffs' defamation and state law false arrest claims must be dismissed.

CONCLUSION

Defendants/Appellants respectfully request that this Court REVERSE the trial court's Ruling denying summary judgment as to Plaintiffs' state law defamation and false arrest claims.

Dated this 5th day of July, 2012.

J. WESLEY ROBINSON
Senior Salt Lake City Attorney
Attorney for Defendants/Appellants

CERTIFICATE OF COMPLIANCE

This brief, submitted under Utah Rule of Appellate Procedure 24(f)(1), complies with the type-volume limitation. The word processing system used to prepare this brief states that it contains 3,737 words and 407 lines in Times New Roman type, which is a proportionally spaced font.

CERTIFICATE OF DELIVERY

I hereby certify that on the 5th day of July, 2012, I caused to be hand-delivered two true and correct copies of the foregoing BRIEF OF APPELLANTS to:

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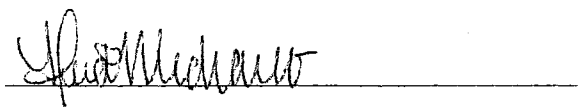

ADDENDUM #1

TRIAL COURT RULING DATED DEC. 7, 2011

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

PEAK ALARM COMPANY, INC., a Utah corporation; JERRY D. HOWE, an individual; and, MICHAEL JEFFREY HOWE, an individual, Plaintiffs, vs. SALT LAKE CITY CORPORATION, a Utah municipal corporation; SHANNA WERNER, an individual; CHARLES F. "RICK" DINSE, an individual; SCOTT ATKINSON, an individual, JAMES BRYANT, an individual; and, JOHN DOES I-X, individuals, Defendants.	RULING Case No. 050906433 Judge: L.A. DEVER

The entitled matter is before the Court following the hearing of September 21, 2011, addressing Plaintiffs' Motion to Strike Trial Date And Either Amend Ruling Or, In The Alternative , Enter Final Judgment As To Dismissed Claims and, Defendants' Memorandum in Response to Court's Directive.

Having reviewed the noted memoranda and having heard oral arguments on the entitled matter, the Court CLARIFIES IN-PART and AMENDS IN-PART its Ruling of

August 19, 2011[1].

Plaintiffs maintain that pursuant to the ruling issued by the Utah Supreme Court, the causes of action that remain include: (1) False Arrest/Imprisonment against Defendants Shanna Werner ("Werner"), Alarm Coordinator for Salt Lake City Police Department and Sergeant James Bryant ("Bryant"), Salt Lake City Police Officer, (2) Malicious Prosecution against Werner and Bryant, (3) Fourth Amendment Violation against Werner and Bryant, (4) Defamation against Werner, and (5) Civil Conspiracy against Werner and Bryant.

Defendants also raised a claim asserting that Plaintiffs' state claims are barred by the relevant statute of limitations. In regards to that issue, the language of the Utah Governmental Immunity Act ("Act"), sheds light on this contentious issue.

Utah Code Annotated, Section 63-30-11(1) states, "A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run." (2003)[2].

Reading the noted section of the Act in light with Section 63-30-15(2), which unambiguously provides that "[t]he claimant shall begin the action within one year after

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[1]The Court's August 2011 Ruling followed a remand ruling issued by the Utah Supreme Court on April 19, 2010, Peak Alarm Company, Inc. v. Salt Lake City Corp., 2010 UT 22, 243 P.3d 1221.

[2] The Legislature clarified that "injuries alleged to be caused by a governmental entity that occurred before July 1, 2004, [are to] be governed by the provisions of Title 63, Chapter 30, Utah Governmental Immunity Act[.]" Laws 2004, c. 267, 48.

the denial of the claim *or* within one year after the [ninety day] denial period specified in this chapter has expired;" is an indication that such claims may be tolled for the duration of the approval/denial period. See Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc., 2011 UT App 232, ¶12, 2011 WL 2714429 (Aug. 10, 2011) ("To discern legislative intent, we look first to the statute's plain language. Also, when interpreting statutes, [w]e presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning. Additionally, [w]e read the plain language of [a] statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters. Furthermore, if the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed." (citation omitted)).

Plaintiff Michael Jeffrey Howe ("Howe") was issued the citation on July 21, 2003, and later arraigned[3]. and pled not guilty on July 30, 2003. See also Utah Code Ann. § 77-2-2(3) (2003) ("'Commencement of prosecution means the filing of an information or an indictment.") Howe's trial was held on April 12, 2004, at which time the Honorable Paul F. Iwasaki concluded that (1) the City failed to produce any evidence establishing criminal intent; (2) the City did not meet the necessary elements to prove that Howe

[3]An arraignment is defined as a "proceeding whereby a defendant is brought before a judge having jurisdiction to try the offense so that the defendant may be formally apprised of the charges pending against him or her and directed to plead to them." 21 Am Jur 2d Criminal Law § 545 (2008).

violated 76-9-105(1); and, (3) no evidence was presented that Howe knowingly or intentionally made false representations to Salt Lake City dispatch or made a false alarm as per 76-9-105(1). (Exs.. to Pls' Mot. for Part. Summ. J., Ex. 9, 4-5).

On June 25, 2004, Howe filed his notice of claim with Salt Lake City, with the Complaint being filed on April 7, 2005. Because Plaintiffs' Complaint was filed within one (1) year, regardless of a denial or approval, the noted claims are timely pursuant to the Act. Utah Code Ann. § 63-30-15(2).

Addressing Plaintiffs' causes of action, the Court rules as follows.

1. *42 U.S.C. §1983, Deprivation of Constitutional Rights*

Although Plaintiffs heavily rely on the Utah Supreme Court's ruling, they failed to present any evidence that Werner participated in the seizure, i.e., creating such a *circumstance* that "a reasonable person would have believed that he was not free to leave." Peak, 2010 at ¶44 (citing Michigan v. Chesternut, 486 U.S. 567, 573; Reeves v. Churchich, 484 F.3d 1244, 1259 (10th Cir.2007))(emphasis added).

While Plaintiffs claim that an issue(s) of fact pertaining to probable cause[4] as to whether any of the of the information to proceed against Howe was provided by Werner, that does not remedy the scenario that played out the day of July 21, 2003,

[4]Plaintiffs relied in part, on Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991), for support of retaining the noted claim against Werner. However, the Hodges' case does not address the issue of a Fourth Amendment seizure.

and whether Howe believed he was free to leave when *Bryant* allegedly claimed that he was there to arrest Howe. See Novitsky v. City Of Aurora, 491 F.3d 1244, 1253 (10th Cir. 2007) ("A *seizure* occurs for Fourth Amendment purposes whenever a police officer accosts an individual and *restrains his freedom to walk away*." (citation and quotations omitted)(emphasis added)).

Plaintiffs' reliance on cases such as Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991), to impute liability to Werner are misplaced. In Hodges, a Gibson store manager, Cosgrove, initially confronted Hodges for allegedly stealing money. Id. at 155. It was only after Cosgrove's initial confrontation and reliance upon Cosgrove's initial allegations that Gibson management pursued action against plaintiff. Id. Moreover, although Gibson management discovered that Cosgrove had embezzled company funds, which actions were attributed to plaintiff, it failed to inform the prosecuting attorney of the recently discovered facts until the eve of plaintiff's trial. Id. Plaintiff sued both Cosgrove and Gibson, for malicious prosecution and intentional infliction of emotional distress.

The court, in its analysis, determined that the theory of vicarious liability was applicable to Gibson. Id. at 156-157. The Hodges court explained:

> The law established in Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989) [citation omitted], is that an employer is vicariously liable for an employee's intentional tort if the employee's purpose in performing the acts was either wholly or only in part to further the employer's business,

> even if the employee was misguided in that respect. . . . The rule of vicarious liability for intentional torts stated in Birkner also applies when a servant or an agent is authorized to initiate a legal action. [citing Restatement (Second) of Agency §253 cmt. a]. . . .
>
> Crosgrove and other Gibson officials. . . clearly acted within their delegated authority in bringing charges against Hodges; indeed, Crosgrove acted under express directions from corporate officials and also had the authority of a manager. Even if his authority as a manager were not sufficient to authorize him to initiate a criminal prosecution, it is clear that in this case he acted with the approval and under the direction of higher officials.

811 P.2d at 156-57.

Plaintiffs have failed to show any evidence that Werner had any authority to over Bryant in order to impute vicarious liability to her. See (Exs.. to Pls' Mot. for Part. Summ. J., Ex. 15 (Werner Dep. 9:1-12, July 12, 2007)).

In addition, the supreme court's findings of Howe's alleged violation of his Fourth Amendment right to be free of from unreasonable seizures, was based *solely* on the assessment of Bryant's actions and not Werner's. Peak, 2010 at ¶¶ 44-56[5].

Therefore, Plaintiffs' Fourth Amendment claim remains a viable cause of action for consideration in trial against Bryant only.

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[5]In concluding, the court writes of Howe's Fourth Amendment claim:

> In sum, Mr. Howe has presented facts that tend to show *Sgt. Bryant* violated his Fourth Amendment right to be free from unreasonable seizure, a right clearly established at the time of Sgt. Bryant's alleged misconduct.

Id. at 56 (emphasis added).

2. *False Arrest/Imprisonment*

The essential elements of false imprisonment are: (1) the detention or restraint of one against his will and (2) the unlawfulness[6] of the detention or restraint. 32 Am Jur 2d False Imprisonment § 7 (2008); Lee v. Langley, 2005 UT App 339, ¶19, 121 P.3d 33, ("False imprisonment is an act intending to confine the other within boundaries fixed by the actor, which results in a confinement while the other is conscious of the confinement or is harmed by it." (citations and quotations omitted)).

Because Plaintiffs failed to establish that Werner participated in the restraint or is vicariously liable for Bryant's alleged detention/restraint of Howe, this claim remains a viable cause of action at trial only against Bryant.

3. *Malicious Prosecution*

Although the supreme court determined that Werner and Bryant are entitled to qualified immunity as to Plaintiffs' Section 1983 malicious prosecution claim, Peak, 2010 at ¶¶57-62, Plaintiffs maintain their state law claim of malicious prosecution is still a viable cause of action.

Specifically, Plaintiffs rely on the language of the supreme court. Plaintiffs first cite to paragraph twenty-four (24), where the court stated:

> [P]robable cause to effectuate an arrest requires that we objectively

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[6]In order for a statute to render an arrest lawful, the arrest "must be effected in accordance with statutory dictates." Lee v. Langley, 2005 UT App 339, ¶13, 121 P.3d 33 (citation omitted).

> review the actions by police by asking whether from the facts known to the officer, and the inferences [that can] fairly ... be drawn therefrom, a reasonable and prudent person in [the officer's] position would be justified in believing that the suspect had committed the offense. Therefore, we must determine whether the facts known to Sgt. Bryant and Ms. Werner, along with any fair inferences that may be derived from them, would lead a reasonable and prudent person in the officer's position to be justified in believing that the suspect had committed the offense.

Id. at ¶24 (citations and quotations omitted).

This statement is drawn from the supreme court's assessment from Plaintiffs' Motion for Partial Summary Judgment claim that Bryant and Werner acted without probable cause in arresting Howe. The court, however, went on to conclude:

> Mr. Howe told police dispatch that a security guard had verified the burglary. He knew that police would not otherwise respond. From his lobbying activities, Mr. Howe knew the content of the Salt Lake City ordinance. And Mr. Howe's own employee had been told by a police dispatcher, minutes earlier, that police would not respond to unverified burglar alarms by an alarm company. Additionally, Mr. Howe's own "whatever it takes" statement could be interpreted by a prudent officer as meaning that Mr. Howe would say anything necessary to persuade police to respond to a mere burglary alarm regardless of whether he believed an actual burglary had occurred. Finally, there are inconsistencies in Mr. Howe's initial statements. Mr. Howe told police dispatch that there was a burglary in progress. By the time Mr. Howe was interviewed by police, he claimed he was reporting a "panic alarm" based on a theory that "someone's life could potentially be in danger." Given these facts, *we cannot conclude as a matter of law that a prudent officer would not have been justified in concluding Mr. Howe reported a crime while knowing it was false*.
>
> This does not mean there are no facts suggesting Sgt. Bryant and Ms. Werner acted without probable cause. Indeed, in Part III we discuss these facts thoroughly. But, given that we must view the facts in a light most favorable to Salt Lake City—the nonmoving party on this

motion—we conclude the *district court did not err in rejecting Mr. Howe's motion for partial summary judgment.*

Id. at ¶¶ 26-27 (emphasis added).

The next section for support cited by Plaintiffs, paragraphs forty-nine (49) to fifty-four (54), is the supreme court's assessment of Plaintiffs' Section 1983 claim, specifically, Plaintiffs' Fourth Amendment claim. These paragraphs address whether "Mr. Howe provided sufficient facts to demonstrate Sgt. Bryant lacked probable cause for the arrest." Id. at ¶ 48. Unlike Plaintiffs' reflection of the court's conclusion in their Opposition/Reply Memorandum in Response to Court's Directive, pages four(4) through six (6), the court actually stated:

> Our decision here, as it was in Part I, is largely conditioned on the burden imposed under the analysis. Unlike Part I, we must accept the facts as presented by Mr. Howe as true in this part of our analysis. [citation omitted]. Mr. Howe has claimed, and has presented supporting facts, that he subjectively believed a burglary occurred at the school, and relayed that information to police. Sgt. Bryant and Ms. Werner simply disregarded this construction of the facts known to them. When Mr. Howe attempted to contact Ms. Werner directly to explain the events of June 27, 2003, she refused to respond, stating she did not need to listen to Mr. Howe's "rationalization and justification." We believe the facts alleged by Mr. Howe raise *at least a jury question on the lack of probable cause* and, therefore, make out a constitutional violation *of Mr. Howe's right to be free from unreasonable seizure* sufficient to survive qualified immunity.

Id. at 54 (emphasis added). The court did not make any findings in regards to Werner and Plaintiffs' specific state law claim of malicious prosecution.

As noted in footnote five (5) above, the supreme court concluded this particular

section in finding that "Mr. Howe has presented facts that tend to show *Sgt. Bryant* violated his Fourth Amendment right free from unreasonable seizure[.]" Id. at ¶56 (emphasis added). There is no finding made by the supreme court as to probable cause and Werner in relation to Plaintiffs' state law claim of malicious prosecution.

Howe has the burden of proving the following four elements of the tort of malicious prosecution: (1) Werner and Bryant initiated or procured the initiation of criminal proceedings against an innocent plaintiff; (2) Werner and Bryant did not have probable cause to initiate the prosecution; (3) Werner and Bryant initiated the proceedings primarily for a purpose other than that of bringing an offender to justice; and (4) the proceedings terminated in favor of the accused. Hodges, 811 P.2d at 156 (citations omitted).

As to the second prong of the malicious prosecution test, Plaintiffs rely on deposition statements of Werner and Bryant, in that Bryant consulted with Werner to determine which ordinances were violated. (Exs.. to Pls' Mot. for Part. Summ. J., Ex. 8 (Bryant Dep. 89:12-93-23, July, 10, 2007).

In response to counsel's question, Bryant stated that he and Werner determined that the "false alarm ordinance and ordinances, city ordinances that are sort of incorporated in the false alarm ordinance couldn't be used against Mr. Howe[.]" Id. at 92:1-6.

Bryant then explains that he proceeded to conduct research on a computer system with access to the state code and all city ordinances and found a state code that he proceeded to cite against Howe. Id. 92:9-93-23.

The Utah Supreme Court explained in Hodges:

> An accusation leading to the initiation of a criminal prosecution must be based on probable cause determined as of the time the action was filed. See Restatement (Second) of Torts § 662 comment e (1977). n.3[7] The *accuser must have sufficient information based on an adequate investigation to justify the conclusion that there is probable cause to initiate a criminal proceeding.* [citations omitted]. The accuser must have a reasonable basis for believing the accusation and must also subjectively believe the accusation to be true.

811 P.2d at 158 (citations omitted)(emphasis added).

Because doubts, uncertainties or inferences concerning issues of fact must be construed in a light most favorable to the party opposing summary judgment, Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258, 1261 (Utah

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[7]Note three provides:

> The Restatement (Second) of Torts § 662 (1977) provides a three-part standard for determining whether a defendant has probable cause in initiating an action for malicious prosecution:
>
> One who initiates or continues criminal proceedings against another has probable cause for doing so if he correctly or reasonably believes
> (a) that the person whom he accuses has acted or failed to act in a particular manner, and
> (b) that those acts or omissions constitute the offense that he charges against the accused, and
> (c) that *he is sufficiently informed as to the law and the facts* to justify him in initiating or continuing the prosecution.

Id. at n.3. (emphasis added).

1984) (citations omitted), i.e. Plaintiffs in regards to Defendants' Motion for Summary Judgment, Plaintiffs' state law claim of malicious prosecution remains a viable cause of action for consideration in trail against Werner and Bryant.

4. *Defamation*

This remains a viable cause of action for consideration in trial against Werner in her individual capacity.

5. *Conspiracy*

This remains a viable cause of action for consideration in trial against Werner and Bryant.

This Ruling stands as the ORDER of the Court. No further Order is required.

ANNOUNCED and DATED this 7th day of December, 2011.

BY THE COURT:

L.A. DEVER
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that on the 7th day of December, I delivered a true and correct copy of the above Ruling to the following:

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